IN THE UNITED STATES DISTRICT COURT FOR THE DISTICT OF SOUTH CAROLINA COLUMBIA DIVISION

Allison Alphonso Ross,
Plaintiff,

v.

University of South Carolina, and Gene L. Luna,
Defendants

Civil Action No. 3:99-0984-17BD
May 16, 2000

Report and Recommendations

Marchant, United States Magistrate Judge

This action was filed by the Plaintiff pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (e), et. Seq., 42 U.S.C. § 1983, and 42 U.S.C. § 1981. Specifically, Plaintiff asserts in his Complaint claims for discriminatory failure to promote under Title VII, discriminatory termination under Title VII, deprivation of equal rights under 42 U.S.C. § 1981, and violation of his First Amendment rights under 42 U.S.C. § 1983. Plaintiff also asserts a pendant state law claim for breach of contract.

Both Defendants filed a motion for summary judgment as to all claims on December 15, 1999. Plaintiff filed a memorandum in opposition to Defendants' motion on December 22, 1999, in which he

dropped his equal rights claim under § 1981 and his discriminatory failure to promote claim under Title VII. Plaintiff opposes summary judgment as to his remaining claims. The Defendants filed a reply memorandum on December 30, 1999. Defendants' motion is now before the Court for disposition. [1]

Background[2]

Plaintiff, an African-American, worked for the Defendant University of South Carolina ("USC") from July 1982 until September 3, 1998. See Complaint, p. 2. Plaintiff began his employment with the Defendant as an area manager for Residential Life Services, and by the time of his discharge had risen to the position of Assistant Director of Housing Maintenance ("ADHM"). See Complaint, p. 3. The ADHM position is directly below the Associate Director of housing Facilities ("ADHF"). See Defendants' Exhibit 12.

In the fall of 1997, USC began the process of selecting a candidate for the ADHF position, which was vacant at that time. The Defendant Gene Luna, Director of

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[1] This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(A) and (B) and Local Rule 73-.02(B)(2)(g), D.S.C. The Defendants have filed a motion for summary judgment. As this is a dispositive motion, this Report and Recommendation is entered for review by the Court.

[2] The facts and evidence are considered and discussed hereinabove in the light most favorable to the Plaintiff, the party opposing summary judgment. Pittman v. Nelms, 87 F.3d 166, 188 (4th Cir. 1996).

Housing for USC ("Luna"), formed a screening committee to narrow the applicant field and to select the finalist for the ADHF position. See Defendants' Exhibit 13. Plaintiff applied for the position, but was not selected by the Committee as one of the eight finalists. [3] Luna Deposition, p. 26; Defendants Exhibit 11. Tom Battenhouse (white male) was eventually selected for the position. Luna Deposition, pp. 11-12; Luna Affidavit. ¶ 13.[4] Plaintiff thereafter filed an internal grievance on March 16, 1998, alleging, inter alia, race discrimination in his non-selection. See Plaintiff's Deposition, Exhibit 26. Following an unfavorable grievance decision on May 7, 1998. Plaintiff appealed the decision and pursued other grievance avenues, all of which were unsuccessful. See Defendant's Exhibits 4, 8, 22-24. Plaintiff went on to file

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[3] Thirty-eight applicants, including the Plaintiff and one other internal candidate, were considered by the Committee. Luna Deposition, p. 19

[4] The position was initially offered to an African-American male; however, that candidate rejected the offer in favor of another job offer he had received. Luna Deposition, pp. 52-53; Luna Affidavit, ¶ 12 ; Plaintiff Deposition, Exhibit 7.

complaints with the Office of Federal Contract Compliance Programs, the Equal Employment Opportunity Commission ("EEOC"), and the South Carolina Human Affairs Commission ("SCHAC"). See Defendants Exhibits 1 and 2.

Plaintiff alleges that after he filed his complaints alleging discrimination, Battenhouse (at the direction of Luna) began to scrutinize Plaintiff's work and prevent Plaintiff from managing his job area in retaliation for Plaintiff having filed his complaint of discrimination. As evidence of this retaliation, Plaintiff complains the Battenhouse instructed him to remove a miniature putting green which Plaintiff had set up in his office, although the presence and use of such "stress release" devices had never been objected to before, and hat Battenhouse also required him to leave his office door open, although no other employees we subjected to this requirement. Plaintiff's Deposition, p. 64; See also Battenhouse Affidavit, ¶ 9; Defendants Exhibit 5. It is undisputed that Plaintiff refused to remove the putting green, and that he also continued to both close, and sometimes lock, his office door. Defendants Exhibits 6, 9, 22 (pp. 30-31). Plaintiff was eventually terminated by USC on September 3, 1998, on grounds of insubordination. Defendants' Exhibit 7. Plaintiff grieved his termination, which was upheld. Defendants' Exhibits 8, 9 and 24.

Discussion

Summary judgment "shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admission on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." Rule 56 (c), Fed. R. Civ. P. The moving party has the burden of proving that judgment on the pleadings is appropriate. Once the moving party makes this showing, however, the opposing party must respond to the motion with "specific facts showing there is a genuine issue for trial" Rule 56 (3), Fed. R. Civ. P.

I.
First Amendment Claim

In his Fifth Cause of Action, Plaintiff asserts a First Amendment Claim under 42 U.S.C. § 1983. This claim is asserted only against the Defendant Luna in his individual capacity. See Plaintiff's Memorandum in Opposition to Summary Judgment, p. 1. As a state employee, Luna is subject to suit for damages in his individual capacity under § 1983. Hafer v. Melo, 112 S. Ct. 358, 365 (1991); Goodmon v. Rockefeller, 947 F.2d 1186 (4th Cir. 1991); Inmates v. Owens, 561 F.2d 560 (4th Cir. 1977); Gomez v. Toledo, 446 U.S. 635, 640 (1980); Parsons v. Bourff, 739 F.Supp.1266, 1267 (S.D. Ind. 1989); DePugh v. Penning, 888 F. Supp. 959, 965 (N.D. Iowa 1995).

Plaintiff alleges in this cause of action that his right to free speech guaranteed by the First Amendment was violated when Luna took affirmative efforts to "chill" his speech and fired him in retaliation for engaging in his right of free speech. See Rankin v. McPherson, 483 U.S. 378, 383 (1987), citing Perry v. Sindermann, 408 U.S. 593, 597 (1972) [A government official "may not

discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."] However, it is well settled that in order to be protected, speech must be on a matter of public concern, and that in the case of public employee, the employee's interest in expressing himself must also not be outweighted by any injury the speech services it performs through its employees." Waters v. Churchill, 114 S. Ct. 1878, 1884 (1994) [quoting Connick v. Myers, 461 U.S. 138, 142 (1983) (quoting Pickering v. Bd. of Educ., 391 U. S. 563, 568 (1968)]. Hence, and employee who speaks out not on matters of public concern, but only upon matters of personal interest, is not protected by the First Amendment. Connick, 461 U.S. at 147.

Plaintiff alleges that he exercised his First Amendment rights and was speaking out on a matter of public concern when he filed his internal grievance with the Defendants and his complaint with SCHAC and the EEOC. Plaintiff relies on Cromer v. Brown, 88 F. 3d 1315 (4th Cir. 1996), to support his claim that his actions touched on an area of vital public interest, racial discrimination, and that his subsequent termination because he exercised this right violated his rights under the First Amendment. However, the fact in Cromer are clearly distinguishable form the facts in the case at bar. In Cromer, the African American Plaintiff was on of a group of sheriff's deputies who formed a "Black Law Enforcement Officers Association" to speak out about alleged racial discrimination in employment practices under the current sheriff. The sheriff blamed Cromer for the Association's activities, and allegedly fired him because of his activities. Under these facts, the Court held that Cromer, in his activities, spoke as a citizen on

a matter of public concern, and had therefore stated a First Amendment claim under § 1983. 88F 3.d at 1325-1326. However, the Court specifically distinguished Cromer's situation from one in which a single employee complains about a personal employment dispute. Id, at 1326.

Here, the record reflects that the Plaintiff complained that he was the victim of race discrimination when he was denied the promotion to ADHF. A review of Plaintiff's complaint show that his comments to his supervisors on this matte almost exclusively, concerned his own personal situation. See generally Defendant's Exhibits 1,2 and 4; see also, Complaint. In fact, Plaintiff responded "no when asked "Do you know any other employees or applicants of your group who were treated in the same way (checked above) you allege you were?" on his internal complaint. See Defendants' Exhibit 4. Hence, it is apparent from the weight of the evidence in the file that Plaintiff was motivated in his actions out of a concern with his own person circumstances, not with any group as a whole. This finding is bolstered no only by Plaintiff's own evidence submitted in this case, but by a review of the statement of facts contained in the Complaint, which exclusively deal with Plaintiff's personal employment situation. As such, this evidence is insufficient to maintain Plaintiff's First Amendment claim. Childress v. City of Richmond, 907 F. Supp. 934, 941 (E.D. Va. 1995), adopted and aff'd, 134 f.3d 1205, 1207 (4th Cir. 1988) (en banc), cert. denied, 118 S. Ct. 2322 (1998) [to prevail on a First Amendment claim, Plaintiff must show that the speech which he alleges led to the retaliatory actions on the part of the Defendant was "on

matters of public concern, rather that as an employee on matters peculiar to his employment"]; Huang v. Bd. Of Governors of Univ. of North Carolina, 902 F. 2d 1134, 1140 (4th Cir 1990) " [[A] public employee's expression of grievances concerning his own employment is not a matter of public concern."].

A complaint of employment discrimination made by a public employee is not inherently protected merely because the subject of the complaint is discrimination, and the mere fact that Plaintiff complained to his supervisors and to outside agencies such as SCHAC and the EEOC about discrimination allegedly practiced against him is not sufficient to transform those complaints form personal grievances into protected speech. Ayoub v. Texas A&M University, 927 F.2d 834 (5th Cir. 1981); Callaway v. Hafeman, 832 F2d 414 (7th Cir 1987); David v. City and County of Denver, 101 F. 3d 1344, 1354-1357 (10th Cir. 1997), cert. denied, 118 S. Ct. 157 (1997); Morgan v. Ford, 6 F.3d 750 (11th Cir. 1993); Williams v. Strickland, No. 92-515, 1993 WL 153915, *3 (D.S.C. Mar. 12 1993).

Therefore, Plaintiff's First Amendment claim is without merit and should be dismissed.[5]

II.
(Title VII Retaliation Claim) [6]

In his Title VII claim (asserted against the Defendant USC), Plaintiff asserts that the Defendant terminated him in retaliation for Plaintiff having opposed the Defendant's unlawful conduct. With regard to claims of retaliation, § 704 (a) of Title VII, 42 U.S.C. § 2000 (e) - 3(a), provides as follows:

> It shall be an unlawful practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling

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[5]Defendants also argue in their memorandum that Plaintiff's First Amendment retaliatory discharge claim is preclude by the State Employee Grievance Committee's determination that he was terminated for misconduct. See University of Tennessee v. Elliott, 478 U.S. 788, 799 (1986). However, given the facts as put before the Court and the applicable caselaw dealing with First Amendment claim on the merits. As the undersigned did not reach Defendant's grievance committee argument, no opinion is offered as to the merits of this defense.

[6]While Plaintiff indicates in his memorandum opposing summary judgment that he is pursing this claim, he offers little if any argument on this claim in that document. Therefore, the undersigned has proceeded to analyze this claim by comparing the facts presented with the applicable statute and caselaw, and by drawing whatever inferences can he discerned from these facts in favor of the Plaintiff.

> apprenticeship or other training
> or retraining, including on the job
> training programs, to discriminate
> against any individual, or for a labor
> organization to discriminate against
> any member thereof or applicants
> for membership, because he has
> opposed any practice made an unlawful
> employment practice by this subchapter,
> or because he has made a charge,
> testified, assisted, or participated
> in any manner in an investigation,
> proceeding, or hearing under this
> subchapter.

Retaliation cases under Title VII are subject to the same requirements of proof as are applicable to disparate treatment claims. Ross v. Communication Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985); see also Williams v. Cerberonics, 871 F2d 452,457 (4th Cir. 1989). "The employee is initially required to establish a prima facie case of retaliation by a preponderance of the evidence. Such a prima facie case consists of three elements: (1) the employee engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection existed between the protected activity and the adverse action." Id. Once a prima facie case has been presented the Defendant employer has the burden of producing a legitimate, non-discriminatory reason for its actions. If the employer can produce a legitimate, non-discriminatory reason for its actions, the

employee must demonstrate that the Defendant's proffered reason is pretextural. Id.

1) Prima facie case. With regard to the elements of a prima facie case, it is undisputed that Plaintiff engaged in protected activity (complaining that he was being discriminated against on the basis of his race), and that he was terminated. However, to survive the Defendant's summary judgment motion, Plaintiff "must [also] have evidence from which a reasonable factfinder could conclude that a causal connection exist between the protected activity and the adverse action[s]." Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653,656 (4th Cir. 1998) That is, he must proffer evidence sufficient to create a genuine issue of fact that his employer "[took] the adverse employment action[s] because [he] engaged in protected activity." Id, at 655. Defendant argues that Plaintiff has failed to establish any causal connection between Plaintiff's having engaged in protected activity and the adverse actions of which he complains.

As evidence of a causal connection, Plaintiff primarily points to the relatively close proximity of time between Plaintiff's internal complaint in March 1998 and his termination in September 1998. Although obviously not dispositive on this issue, a showing of only a short period of time between a Plaintiff having engaged in protected conduct and an adverse employment action being taken against that Plaintiff is a factor to be considered by the Court in weighing retaliation claims. Carter v. Ball, 33F.3d 450, 460 (4th Cir. 1994) [finding decision to downgrade a position six weeks after an EEO hearing presented a causal

connection]. But see Cecilino v. Allstate Ins. Co., 908 F.Supp. 519, 532 (N.D. Ill. 1995) [involving 2 ½ month lapse] [a simple showing that an adverse action occurred after a complaint of discrimination "is not enough to make out a prima facie case of retaliation, let alone to survive a motion for summary judgment.']. Here, approximately six months passed between Plaintiff's initial protected activity and his discharge, however, Plaintiff also points to events which he argues show a build-up of animosity towards him during that time period 9i.e., the "putting green" and "open door" disputes). While this evidence is obviously not conclusive as to whether Plaintiff's termination was in retaliation for Plaintiff having engaged in protected activity, the undersigned finds that for purposes of summary judgment only, an in order to allow for further consideration and discussion of Plaintiff's retaliation claim, it is sufficient to satisfy the less demanding burden of making a prima facie case of causality. Jones v. City of Elizabeth City, North Carolina, 840 F.Supp. 398, 403 (ED.N.D. 1996), aff'd., 2F.3d 1149 (4th Cir. 1993); Williams v. Cerberonics, 871 F .2d 452, 457 (4th Cir. 1989); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Proud v. Stone, 945 F 2d 796,798 (4th Cir. 1991) [the burden of establishing a prima facie case is not onerous].

2)Legitimate, non-discriminatory reason. Assuming Plaintiff has established a prima facie case, the inference of discrimination created by the establishment of a prima facie case may be rebutted by the Defendant if is sets forth a legitimate, nondiscriminatory reason for its actions.

Lovelace v. Sherwin Williams Co., 681 F. 2d 230, 239 (4th Cir. 1982). [7] Here, the Defendant has presented evidence to show that Plaintiff was terminated because of declining performance which was allegedly precipitated by Plaintiff's insubordination and his desire to set his own work terms. This evidence is sufficient to establish a legitimate, non-discriminatory reason for the disciplinary actions taken against the Plaintiff. EEOC v. Clay Printing Co., 955 F.2d 936, 941 (4th Cir. 1992). [ADEA case] [The Defendant's Burden in establishing legitimate, non-discriminatory reason is only one of production, not of persuasion.]

3) Pretext. Where a Defendant employer rebuts the employee's inference of discrimination by demonstrating a legitimate, non-discriminatory reason for the employment decision, the Plaintiff/employee can still prevail by demonstrating by a preponderance of the evidence that the employer's proffered reason is a mere pretext for discriminatory conduct. To make this demonstration, Plaintiff must show that "but for" his employers intent to discriminate against him, he would not have suffered the adverse employment

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[7] The establishment of a prima facie case does shift to the Defendant the burden of producing evidence on this issue. Lovelace v. Sherwin-Williams, Co., supra.

action. EEOC, 955 F.2d at 941; Conkwright v. Westinghouse, 933 F .2d 231, 234 (4th Cir. 1991). "Direct or indirect evidence of discriminatory motive may do, but 'the evidence as a whole... must be sufficient for a reasonable fact-finder to infer that the employer's decision was motivated by [retaliatory animus].'" LeBlanc v. Great American Insurance Co., 6F.3d 836, 843 (1st Cir. 1993) (citing Goldman v. First Nat'l Bank, 985 F2d 1113, 1117 (1st Cir 1993) (quoting Connell v. Bank of Boston, 924 F .2d 1169, 1172, n.3. (1st Cir. 1991), cert. denied 111 S. Ct. 2828 (1991); Vaughan v. Metrahealth Companies, 145 F. 3d 197 (4th Cir. 1998) [Applying the pretext plus standard, which requires a showing that "both the reason was false, and that [retaliation] was the real reason" (quoting St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 515 (1993)]; Gillins v. Berkley Electric Cooperative, Inc., 148 F. 3d 413, 416-417 (4th Cir. 1998) [applying the pretext plus standard].

After careful review and consideration of the evidence, the undersigned does not find that Plaintiff has submitted sufficient facts to establish pretext in this case. The mere fact that Plaintiff complained that he believed he was being discriminated against does not immunize him from otherwise being reprimanded, suspended or discharged for valid reasons. Ross 759 F.2d at 366 ["Title VII serves the laudable goal of protecting employee access to agencies and courts. It does not shield employees form normal sanctions for misconduct."]; Bodoy v. North Arundel Hosp., 945 F. Supp 890 898 (D.Md. 1996). Further, Plaintiff's termination occurred some six (6) months *after* he made his complaints of racial discrimination. Even giving Plaintiff the benefit of the doubt in allowing this time

frame to be sufficient to establish a prima facie case, it does not in and of itself provide evidence of pretext. Cecelino, 908 F. Supp. at 532; Casey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998) ["A thirteen month interval between the charge and the retaliation is too long to establish causation absent other evidence of retaliation."]; Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998) ["A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action...negates any inference that a causal connection exists between the two.']; Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir. 1997) [four month lag between protected activity and termination not sufficient to justify an inference of causation].

While Plaintiff also points to the allegedly bad treatment he received up to the time of this termination in an effort to connect the events, the evidence shows that Plaintiff was clearly insubordinate during this time. After Battenhouse received the position of ADHF, he was told by the Plaintiff during their initial conversation that he [Plaintiff] would not be of much help to Battenhouse because he was bitter about not having himself been selected for the position. Battenhouse attests that thereafter Plaintiff was continually resistant to this authority, defensive about even minor request, and noncompliant with directives regarding assignments and deadlines. Battenhouse specifically attests that,

> On April 1, 1998, I distributed to my subordinates a memo requesting a meeting

on April 3 to discuss various projects. I requested preparation by each individual. [Plaintiff] came unprepared but agreed to submit material no later tan the following Monday. After a second verbal request on April 7 [Plaintiff] provided minimal information in an unacceptable format on April 8, 1998.

On April 3, 1998, I went to [Plaintiff 's] office and found his door locked. I knocked on the door and after a few minutes, [Plaintiff] opened the door. I explained to him that I needed written information as to his involvement. [Plaintiff] became argumentative but stated he would write the memo. I informed [Plaintiff] that the memo was due no later than April 6, 1998. [Plaintiff] did not comply. On the afternoon of April 13, 1998, I made a second request to [Plaintiff] for the memo. Once again, I found his office door closed and locked. He stated he had not written the memo and was not going to. I asked him if he was refusing to do what I had requested. He first said "yes" and then replied "no" because he felt he did not need to writ a new memo when the original memo had the information requested.

On May 1, 1998, I again met with [Plaintiff]. Upon entering my office, [Plaintiff] stated to me "Before we

> start, I want you to know the rules do not apply to me." I asked [Plaintiff] to explain to me what he meant by that statement. He responded, "The rules do not apply to me. Don't you understand English?"....
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> On May 11, 1998, I distributed a memorandum to [Plaintiff] as a follow up to our meeting of May 7, 1998. See Attachment A. A copy was provided to my supervisor, Dr. Luna. In the memo, I identified that ...(b) I felt the putting green in his office did not create a positive, professional image and that the putting green was to be removed from his office no later than May 15, 1998. [Plaintiff] was also instructed to refrain from practicing golf during work hours; (c) I had seen [Plaintiff] office door closed and locked when I had previously attempted to meet with him. Effective immediately, the door was to be closed only during meetings requiring a high level of confidentiality and was to be locked only when [Plaintiff] left at the end of the day...
> Battenhouse Affidavit.

Plaintiff does not contest that he was bitter about not having received the promotion to ADHF. The evidence also shows that Plaintiff was specifically instructed to remove the putting green from his office and to stop shutting and locking his door on May 11, 1998. Defendant's Exhibit 5. By June 12, 1998, Plaintiff had

still not complied with either of these instructions, and was in fact affirmatively refusing to do so. Plaintiff was also not doing work and missing meetings and assignments, and he was warned that continued conduct of this type would result in his termination. Defendant's Exhibit 6. However, Plaintiff continued to refuse to comply with directives for his superiors, and was finally terminated on September 3, 1998. [8] Defendant's Exhibit 7. See also, Defendant's Exhibit 9, 12, &13. In response to this evidence, Plaintiff simply argues that he should not have had to remove the putting green from his office, and that he should have been allowed to keep his office door closed, because he believed these directives were "unreasonable". Defendant's Exhibit 9 at p. 5. However, it is not for this Court to determine whether Plaintiff should have been allowed to keep his putting green in his office, or to keep his office door open. The Court is not here to second guess whether the Defendant made the proper employment decisions. Rather, our role is to determine whether there is sufficient evidence that the Plaintiff

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[8]Defendant also points out that Luna's decision to terminate Plaintiff was upheld after review by at least two bodies; first the review within the University, and then the lengthy, formal evidentiary proceeding before the Employee Grievance Committee. Defendant argues that Plaintiff has presented no evidence to show that eight of these proceedings wire unfair or tainted with retaliatory motive, citing to Wagner v. Wheeler, 13 F. 3d 86, 92 n. 5 (4th Cir. 1993)["We doubt very much whether [plaintiff], even had he established that [defendant's recommendation [to terminate] was in retaliation for protected expression, should recover against [the defendant] after the termination decision was reviewed and affirmed by the different bodies, one of which, the Board, is comprises solely of bi-partisan citizens"]

was retaliated against for having engaged in protected conduct to warrant allowing this case to go to trial.

Based on the evidence presented, and in particular Plaintiff's own admissions that he refused to comply with direct and repeated instructions form his boss, the undersigned does not find that such evidence has been submitted. A Title VII Plaintiff cannot defeat a properly supported motion for summary judgment with unsupported speculation or allegations of discrimination. Ross, 759 F2d at 365; Felty v. Granves-Humphries, Co., 818 F.2d 1126, 1128 (4th Cir. 1987); Beale v. Hardy, 769 F.2d at 214. At summary judgment, the non-moving party has an obligation to present evidence to save his or her allegations from the status of speculation, and must respond with specific facts showing a genuine issue for trial. Rule 56, Fed. R. Civ. P.; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (19860; Felty, 818 F.2d at 1129-1130; Gairola, 753 F2d at 1288, n. 4. Plaintiff has failed to present evidence sufficient to create a genuine issue of fact that he was terminated because he engaged in protected activity. Therefore, his claim is without merit and should be dismissed. Walker v. MCI Telecommunication Corp., No. 98-2219, 1999 WL 503534 **5-6 (4th Cir. July 16, 1999)[summary judgment granted where Plaintiff failed to produce actual evidence to support an inference that her race was a motivating factor in the adverse employment action]; Thomas v. Randolph Hills Nursing Center, No. 97-2642, 1998 WL 454088 (4th Cir. July 28, 1998) [under pretext plus approach, plaintiff has primary task of showing some evidence on which a juror could reasonably base a finding that discrimination motivated the challenged employment action]; Bruson v. Andrews

Office &Supply Equipment Co., Inc., No. 98-2379, 1999 WL 371598, at **2 (4th Cir. June 1999) [under pretext plus approach, employee can avoid summary judgement only if he has developed some evidence on which a juror could reasonably base a finding that discrimination motivated the challenged employment action].

III.
(Pendent State Law Claim)

If the District Court adopts the recommendations made herein with regard to Plaintiff's two remaining federal claims, Plaintiff's pendant state law claim, which is asserted only against the Defendant University of South Carolina, will be the only claim remaining in this lawsuit. When federal claims presented in a case originally filed in federal court are dismissed, any state claims should also be dismissed, without prejudice, for the resolution in state court under the general doctrine developed in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). See In Re Conklin, 946 F 2d 306, 324 (4th Cir 1991); Nicol v. Imagematrix, Inc. 767 F Supp. 744, 746, 749 (E.D. Va. 1991); Mills v. Leath, 709 F. Supp. 671, 675-676 (D.S.C. 1988); Carnegie-Melton v. Cohill, 484 U.S. 343 (1988); Taylor v. Waters, 81 f.3d 429, 437 (4th Cir. 1996). Dismissal of this remaining state law cause of action will not only allow the more appropriate court to rule on this exclusively state claim, but will not prejudice the parties, as the parties may seek a fast track for resolution of this claim at the state level. See Rule 40 (c), S.C.R.C.P. Further, this Court is also not required to retain supplemental jurisdiction over this remaining state law claim on grounds that the state

statute of limitations for bringing this claim may have now expired. Federal law provides for tolling of state statutes of limitations for state claims during the period they were pending in federal court and for thirty (30) days afterwards. See 28 U.S.C.A. § 1367 (d); Hedges v. Musco, et al., 204 F.3d 109, 123-124 (3rd Cir. 2000); Beck v. Prupis, 162 f.3d 1090, 1099-1100 (11th Cir. 1998) ["a dismissal under section 1367 tolls the statute of limitations on the dismissed claims for 30 days:]; Seabrook v. Jacobson, 153 F.3d 70, 72 (2d Cir. 1998) ["Section 1367 (d) ensures that the plaintiff whose supplemental jurisdiction is dismissed has at least thirty days after dismissal to refile in state court"].

In any event, although not brought up by the Defendant, it is arguable that, even if this Court were inclined to retain supplemental jurisdiction over Plaintiff's state law claim, it would lack the authority to do so. A state agency is immune from suit in federal court by virtue of the Eleventh Amendment. Therefore, before a state or state agency may be sued in federal district court, it must expressly consent to jurisdiction. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99 (1984); Coffin v. South Carolina Dep't of Social Services, 562 F. Supp. 579, 583-585 (D.S.S. 1983); Belcher v. South Carolina Board of Corrections, 460 f. Supp. 805, 808-809 (D.S.C. 1978); See Batson v. USC, 443 F. Supp. 127, 128 (D.S.C. 1977) [Describing the University of South Carolina as a state agency].

The State of South Carolina has not consented to suit in a federal court. See § 15-78-20 (e), South Carolina Code of Laws, which expressly provides that the State of South Carolina does not waive Eleventh Amendment

immunity, consents to suit only in a court of the State of South Carolina, does not consent to suit in federal court or in a court of another State. See also McCall v. Batson, 285 S.C. 243, 329 S.E. 2d 741, 743 (1985) (Opinion abolishing sovereign immunity in tort "does not abolish the immunity which applies to all legislative, judicial and executive bodies and to public officials who are vested with discretionary authority, for actions taken in their official capacities."). Cf. Pennhurst State School & hospital v. Halderman, supra, 465 U.S. at 121 ("[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment."). Therefore, Plaintiff's state law claim for breach of contract should be dismissed, without prejudice.

Conclusion

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Based on the foregoing, it is recommended that the Defendants' motion for summary judgment be **granted** on Plaintiff's First Amendment claim under § 1983 and retaliation claim under Title VII, and that these causes of action **dismissed,** with prejudice. Plaintiff has withdrawn his remaining federal claims.

With regard to Plaintiff's remaining state law breach of contract claim, it is recommended that this claim be **dismissed**, without prejudice, so that Plaintiff may pursue this claim in state court, if desired.

s/Bristow Marchant
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Allison Alphonso Ross,
Plaintiff,

v.

University of South Carolina and Gene Luna,
Defendants

C/A No.: 3:99-984-17BD

Decided on June 1, 2000

ORDER

Anderson, United States District Judge

This matter is before the court for review of the magistrate judge's report and recommendation made in accordance with 28 USC § 636 (b)(1)(B) and Local Rule 73.02.

The magistrate judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the district court. *Mathew v. Weber*, 423 U.S. 261 (1976). The district court is charged with making a *de novo* determination of those portions of the report and recommendation to which specific objection is made, and it may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge, or recommit the matter to the

magistrate judge with instructions. 28 U.S. C. § 636 (b) (1).

Plaintiff initiated this action against his former employer, the University of South Carolina and Gene L. Luna, Director of Housing for U.S.C. Plaintiff is an African American who worked at U.S.C. form July 1982 until September 3, 1998. He began his employment as area manager for Residential Life Services and by the time of his discharge had risen to the position of Assistant Director of Housing Maintenance ('ADHM"). The ADHM position is directly below the position of Associate Director of Housing Facilities ("ADHF"). In 1997, the position of ADHF became vacant. A screening committee was formed , and plaintiff applied for this position, but was not selected by the committee as one of the eight finalists. Tom Battenhouse, a white male, was selected. Following unsuccessful administrative grievance, plaintiff initiated complaints with the Equal Employment Opportunity Commission ("EEOC") and the South Carolina Human Affairs Commission ("SCHAC").

According to the complaint, after plaintiff made allegations of discrimination, Battenhouse (at the direction of Luna) began to scrutinize the plaintiff's work and prevent plaintiff from managing his job, in retaliation of plaintiff having filed his complaint of discrimination. Plaintiff contend that Battenhouse required him to move a miniature putting green form his office and required him to lease his door open, although no other employees were required to do this. The record in this case reveals that it is undisputed that plaintiff refused to move the putting green, and he also

continued to close, and sometimes lock, his office door. Plaintiff was terminated by U.S.C. on September 3, 1998 on the grounds of insubordination. After filing internal grievances with U.S.C., plaintiff turned to this court. Originally, he asserted claims for discriminatory failure to promote and discriminatory termination (retaliation) under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.; deprivation of equal rights under 42 U.S.C. § 1981; and violation of his First Amendment rights under 42 U.S.C. § 1983. In addition, he asserted a supplementary state law claim for breach of contract.

Before the magistrate judge, both defendants moved for summary judgment. Plaintiff then dropped his equal rights claim under section 1981 and his discriminatory failure to promote claim under Title VII. He opposed summary judgment as to his remaining claims. The magistrate judge to whom this matter was referred has filed a detailed and comprehensive report and recommendation suggesting that the defendant's motion for summary judgment be granted on plaintiff's First Amendment claim under Section 1983 and his Retaliation claim under Title VII. As to the remaining state law claim, the magistrate judge suggests that this court should
dismiss this claim without prejudice so that it may be litigated, if at all, in state court.

Through his attorney, Ross has filed a five page objection memorandum which was received by the clerk on May 26, 2000. The court has carefully reviewed the objection memorandum in light of the report and recommendation and the entire record in

this case and finds no basis for disturbing the magistrate judge's recommended disposition.

The First Amendment Claim

Plaintiff alleges in this cause of action that his right to free speech guaranteed by the First Amendment was violated when Luna took affirmative steps to "chill" his speech and fired him in retaliation for engaging in his right of free speech. As the magistrate judge correctly observes, however, it is well settled that in order to be protected, the speech at issue must be on a matter of public concern, and in this case of public employee, the employee's interest in expressing himself must not be outweighed by any injury the speech would cause to "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Waters v. Churchill*, 114 S. Ct. 1878, 1884 (1994).

In this case, plaintiff alleges that he exercised his First Amendment rights and was speaking out on a matter of public concern when he filed his internal grievance with U.S.C. and his complaints with SCHAC and EEOC. Plaintiff relies primarily on the Fourth Circuit decision of *Cromer v. Brown*, 88 F. 3d 1315 (4th Cir. 1996) to support his claim that his speech touched an area of vital public interest, to wit, racial discrimination at U.S.C. The magistrate judge distinguished the *Cromer* decision, however suggesting that in *Cromer*, the African American plaintiff was one of a group of sheriff's deputies who formed a "Black Law Enforcement Officers Association" to speak out about alleged racial discrimination employment under

the Sheriff. Here, as the magistrate judge notes, plaintiff complained that he was the victim of race discriminated when he was denied promotion to the position of ADHF. The record clearly indicates, however, that his comments to his supervisors on this matter almost exclusively concerned his own personal situation. As the magistrate judge observes, plaintiff responded "no" when asked "Do you know any other employees or applicants of your group who were treated in the same way (checked above) who alleged you were? " on his internal complaint. On this record, the magistrate judge concludes that the plaintiff's evidence is insufficient to maintain a First Amendment claim.

In objecting to this portion of the report and recommendation, Ross contends that the magistrate judge placed undue weight on the "perceived factual differences between the *Cromer v. Brown* case and those of the case at bar". He suggests that nothing in the *Cromer* decision indicates that there must be more than a single employee to bring a First Amendment claim. In regard to the response given on the form asking about other employees of the affected group who were treated similarly, plaintiff suggests that this was in response to a standard Department of Labor form and that the magistrate judge has taken it out of context.

The court is constrained to overrule all of these objections. This court has carefully reviewed the *Cromer* decision and agrees with the magistrate judge that the facts of the case were quite different from the instant case. Because plaintiff has failed to produce

evidence sufficient to create a genuine issue of material fact as to whether his speech touched on a matter of public concern, the magistrate judge was correct in suggesting that this claim be dismissed.

The Title VII Retaliation Claim

The magistrate judge concludes that in regard to the Title Vii claim, the plaintiff has sufficiently set out a prima facie case, and that the defendant has set forth a legitimate, non-discriminatory reason for its actions. The magistrate judge then turned to the third stage of the analysis and inquired as to whether the plaintiff can still prevail by demonstrating by a preponderance of the evidence that U.S.C.'s proffered reason for his discharge was a mere pretext for discriminatory conduct.

The magistrate judge has carefully reviewed the rather voluminous record in this case and has concluded that the plaintiff has not submitted sufficient facts to establish pretext in this case. According to the magistrate judge, the mere fact that plaintiff complained that he believed he was being discriminated against does not immunize him form otherwise being reprimanded, suspended or discharged for valid reasons. The magistrate judge correctly notes that the plaintiff was clearly insubordinate during the relevant period of time and plaintiff himself admitted during the initial conversation with Battenhouse that he (plaintiff) would not be of much help to Battenhouse because he was biter about not having himself been selected for the position. Battenhouse testified that thereafter plaintiff

was continually resistant to this authority, defensive about even minor requests, and non-complaint with reasonable directives regarding assignment and deadline. The most prominent example, of course, is plaintiff's failure to remove the putting green from his office when being given explicit instructions to do so.

In objecting to this portion of the report and recommendation, plaintiff contends that the magistrate judge failed to address " the discrimination evident in requiring Mr. Ross to comply with a higher standard than other employees simply because he complained about race discrimination." He suggests that his work habits did not exhibit "declining performance" as found by the magistrate judge, but actually were the "direct result of [defendants'] discrimination and racially hostile work environment." Plaintiff suggests that the magistrate judge ignored a statement on page 16 of his memorandum that "Luna concedes that prior to his complaints about racial discrimination, Ross was not reprimanded for poor performance". In sum, Ross contends that the magistrate judge placed undue importance on issues raised by defendants that are unsupported by the record.

After reviewing the record in this case, the applicable law, the report and recommendation of the magistrate judge, and plaintiff's objection memorandum, this court concludes that he magistrate judge's recommended disposition is correct. The report and recommendation of that magistrate judge, and plaintiff's objection memorandum, this court concludes that the magistrate judge's recommended disposition is correct. The report and recommendation

is incorporated herein by reference; all objections are overruled; defendants motion for summary judgement as to the Section 1983 claim for violation of the First Amendment and his Title VII claim for retaliation is granted. The remaining federal claims have be withdrawn by the plaintiff. In accordance with the recommendation of the magistrate judge, the court will decline to exercise jurisdiction over the remaining state law claim and will dismiss that claim, without prejudice, to be litigated in state court, if at all.

For the foregoing reason, all federal claims are dismissed, with prejudice, the state claim is dismissed without prejudice; and this action is hereby ended.

IT IS SO ORDERED.

s/Joseph F. Anderson Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Allison Alphonso Ross,
Plaintiff-Appellant,

v.

University of South Carolina; Gene Luna,
Defendants-Appellees.

No. 00-1793
November 1, 2000

WIDENER, MICHAEL, KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Allison Alphonso Ross, Appellant Pro Se. Jonathan Pharr Pearson, C. Frederick W. Manning, II, ELLZEY & BROOKS, L.L.C., Columbia South Carolina, for Appellees.

Unpublished opinions are no binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Allison Alphonso Ross appeals the district court's order denying relief on his 42 U.S.C.A. § 1983 (West Supp. 1999) .

We have reviewed the record and the district court's opinion accepting the magistrate judge's recommendation and fin no reverse error. * Accordingly, we affirm substantially on the reasoning of the district court. See Ross v. University of South Carolina, No. CA-99-984-3-17BD (D.S.C. June 2, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

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*Ross contends that district court misconstrued a statement by him when it rejected his First Amendment Claim. Even if this assertion is correct, the remaining evidence relied upon by the district court adequately supports its judgment.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

U.S. Code 42 § 1981

(a) Statement of equal rights states that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined as for purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. (c) Protection against impairment defined as the rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

U.S. Code 42 § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Evidence 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence".

Federal Rule of Evidence 406

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitness, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.